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6 *The Depository Trust Company*

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9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF NEVADA**

11 CHINA ENERGY CORPORATION, a
12 Nevada Corporation,

13 Plaintiff,

14 vs.

15 ALAN T. HILL, et al.,

16 Defendants.

17 ELENA SAMMONS and
MICHAEL SAMMONS,

18 Third-Party Plaintiffs,

19 vs.

20 CEDE & CO., et al.,

21 Third-Party Defendants.
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Case No. 3:13-cv-00562-MMD-(VPC)

**MOTION TO DISMISS
AND/OR STRIKE OF
DEFENDANTS CEDE & CO. AND
THE DEPOSITORY
TRUST COMPANY**

1 Third-Party Defendants Cede & Co. (“Cede”) and The Depository Trust Company
 2 (“DTC”) (together, the “DTC Defendants”) move the Court in accordance with Rules
 3 12(b)(2) and (6) and 14(a)(4) of the Federal Rules of Civil Procedure to dismiss and/or strike
 4 the first amended third-party complaint (the “FAC”).

5 This motion is made on the grounds that: (a) the Court does not have personal
 6 jurisdiction over the DTC Defendants; (b) third-party plaintiffs (the “Third-Party Plaintiffs”)
 7 have made improper use of the impleader rule in bringing this action against the DTC
 8 Defendants; and (c) the Third-Party Plaintiffs have not pleaded the essential elements of any
 9 of their causes of action against the DTC Defendants.

10 This motion is based on the FAC and is supported by the following memorandum of
 11 points and authorities.

12 MEMORANDUM OF POINTS AND AUTHORITIES

13 **I. SUMMARY OF ARGUMENT**

14 Though far from a model of clarity, the FAC appears to blame the DTC Defendants
 15 and COR Clearing (together with the DTC Defendants, the “Third-Party Defendants”) for
 16 Third-Party Plaintiffs’ failure to perfect their assertion of dissenters’ rights with respect to a
 17 12,000,000 to 1 reverse split effectuated by China Energy Corporation (“CEC”) on July 3,
 18 2013. What is clear, however, is that the FAC – which is the Third-Party Plaintiffs’ second
 19 attempt to assert claims against the DTC Defendants – must be dismissed and/or stricken
 20 because it falls woefully short of elementary jurisdictional, procedural, and substantive
 21 pleading requirements.

1 First, the FAC (like the original third-party complaint) is barren of a solitary factual
2 allegation to form a basis for this Court to exercise personal jurisdiction over the DTC
3 Defendants. This is hardly surprising because the DTC Defendants are New York entities
4 with which the Third-Party Plaintiffs and their stock broker, Just2Trade, have never had any
5 contractual or other relationship. There is simply no basis for the DTC Defendants to be
6 haled into this forum.

7 Second, Third-Party Plaintiffs do not stand to incur any liability in the underlying
8 action brought against them by CEC (the “CEC Action”). As a matter of law, therefore, it is
9 impossible for the DTC Defendants to be derivatively or secondarily liable to Third-Party
10 Plaintiffs. Accordingly, Third-Party Plaintiffs have improperly invoked Fed. R. Civ. P. Rule
11 14 to rope the DTC Defendants into this action.

12 Third, it is black letter law that a complaint must “contain sufficient factual matter,
13 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,
14 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
15 Here, Third-Party Plaintiffs have merely rattled off “breach of contract,” “breach of fiduciary
16 obligations,” “negligence” and a “judicial declaration” as causes of action applicable to all
17 Third-Party Defendants. Third-Party Plaintiffs, however, have neither properly nor
18 sufficiently pleaded any of these causes of action against the DTC Defendants, and so they
19 fail as a matter of law.

20 For these reasons, as set forth more fully below, the FAC should be dismissed with
21 prejudice or stricken as against the DTC Defendants.

II. BACKGROUND¹

A. DTC.

DTC is a wholly-owned subsidiary of The Depository Trust & Clearing Corporation (“DTCC”). *See* Declaration of Peter J. Gleeson, dated February 20, 2014 ¶ 7 (“Gleeson Decl.”) (Ex. 1.) DTCC is a New York corporation with its principal place of business in New York City. (*See id.*) DTCC is a holding company and neither maintains an office nor does business in Nevada. (*Id.* ¶¶ 5-6.)

As set forth in the Gleeson Decl. (¶ 7), DTC is a limited purpose trust company established under New York law with its principal place of business in New York City. DTC neither maintains an office nor conducts business in Nevada. (*Id.* ¶ 10.) DTC is the nation’s principal securities depository and a clearing corporation registered with the U.S. Securities and Exchange Commission under Section 17A of the Securities Exchange Act of 1934. *See id.* It is also a securities intermediary within the meaning of Article 8 of the Uniform Commercial Code. *See* Depository Trust Co., et al.; Order, SEC Release No. 34-20221 (Sept. 23, 1983), 48 Fed. Reg. 45167-02 (Oct. 3, 1983) (Ex. 2); NRS § 104.8102(1)(m)(1). Utilizing advanced automated systems for the “book-entry” transfer of securities, DTC operates a centralized system for the handling of securities deposited at DTC by the major banks and brokerage firms that constitute its “Participants.” 15 U.S.C. 78s(b); *In re The*

¹ The facts set forth in this section are taken from the allegations of the FAC (which the DTC Defendants accept as true solely for the purposes of this motion). The facts set forth in this section are also taken from the Gleeson Declaration (as defined herein) as well as certain statutory and regulatory materials of which this Court can take judicial notice pursuant to Federal Rule of Evidence 201.

1 Depository Trust Co., SEC Release No. 34-47978, 2003 WL 21288541, at *6 (June 4, 2003)
2 (Ex. 3) (the “June 4 SEC Order”).

3 DTC only maintains accounts for its Participants. *See* Processing of Tender Offers
4 Within the National Clearance and Settlement System, SEC Rel. No. 34-19678 (Apr. 15,
5 1983), 48 Fed. Reg. 17603, 17604 n.5 (Apr. 25, 1983) (Ex. 4). DTC does not provide
6 services or maintain accounts for the institutional or individual customers of its Participants,
7 such as the Third-Party Plaintiffs or their stock broker, Just2Trade. (Gleeson Decl., ¶¶ 11-
8 13.) DTC, therefore, does not have any relationship with or owe any duties to the
9 institutional or individual customers of its Participants. *See* U.C.C. §§ 8-506-508; U.C.C. §
10 8-507 cmt. 3 (“One of the basic principles of the indirect holding system is that securities
11 intermediaries owe duties only to their own customers.”); U.C.C. § 8-102 (defining a
12 “securities intermediary” as “a clearing corporation.”); NRS § 104.810(1)(M)(1) (same).

13 Third-Party Plaintiffs do not allege, nor can they, that they or their stock broker,
14 Just2Trade, have ever been Participants of DTC or that either has ever had any contractual
15 relationship with DTC.

16 In accordance with its SEC-approved rules, DTC accepts deposits of securities only
17 from its Participants, credits those securities to the depositing Participants’ accounts and
18 effects changes in beneficial ownership among only its Participants’ DTC accounts by
19 computerized book-entry movements pursuant only to its Participants’ instructions. *See, e.g.,*
20 Rule 6 of DTC’s Rules, *cited in* June 4 SEC Order, at *6 n.54. As such, DTC’s rules obligate
21 and allow DTC to take instructions only from its Participants. June 4 SEC Order, at *7.
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1 The FAC is devoid of any specific allegations of any conduct undertaken by DTC that
2 would subject it to personal jurisdiction in Nevada or to liability under any cognizable theory
3 of relief.

4 **B. Cede & Co.**

5 Cede is a partnership established under the laws of New York with its principal place
6 of business in New York City. (Gleeson Decl., ¶ 9.) Cede & Co. is DTC's nominee for the
7 registration of securities that are deposited at DTC. *Id.*; see U.C.C. art. 8(I)(C) ("Cede & Co.
8 is the nominee name used by [DTC], a limited purpose trust company organized under New
9 York law for the purpose of acting as a depository to hold securities for the benefit of its
10 participants"). Cede neither maintains an office nor conducts any business in Nevada. (*Id.*,
11 ¶ 10.) Third-Party Plaintiffs do not allege, nor can they, that they or their stock broker,
12 Just2Trade, have had any contractual relationship with Cede. The FAC is devoid of any
13 specific allegations of any conduct undertaken by Cede that would subject it to personal
14 jurisdiction in Nevada or to liability under any cognizable theory of relief.

15 **C. The Third-Party Plaintiffs' Allegations Against the DTC Defendants.**

16 The FAC arises from the CEC Action filed by CEC on September 27, 2013 in Nevada
17 state court against the Third-Party Plaintiffs, among others. (*See* FAC ¶ 37.) In the CEC
18 Action, CEC seeks a declaration that the Third-Party Plaintiffs, among others, failed to
19 comply with Chapter 92A of the Nevada Revised Statutes for exercising dissenters' rights
20 and were therefore not entitled to payment under Chapter 92A in connection with the 1 for
21 12,000 reverse split effectuated by CEC on July 3, 2013. (FAC, Exhibit A, ¶ 40.)
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1 On October 8, 2013, the CEC Action was removed to federal court. (FAC ¶ 15.) On
2 November 13, 2013, Third-Party Plaintiffs filed a motion seeking leave of this Court
3 pursuant to Fed. R. Civ. P. Rule 14(a) to file the original third-party complaint against the
4 Third-Party Defendants (the "Leave Motion"). (Dkt. 54.) While the Leave Motion was
5 pending, on December 17, 2013, Michael Sammons, as a defendant in the CEC Action,
6 purported to serve a subpoena on DTC seeking voluminous documents and communications
7 concerning the Shares (the "Subpoena"). On January 22, 2014, this Court granted the Leave
8 Motion, noting that the parties to the CEC Action failed to file points and authorities in
9 opposition and, therefore, were deemed to have consented to the Leave Motion. (Dkt. 115.)
10 None of the Third-Party Defendants received notice of or had an opportunity to be heard
11 concerning the Leave Motion.

12 On January 22, 2014, the Third-Party Plaintiffs filed the original third-party
13 complaint against the Third-Party Defendants. (Dkt. 116). Before the Third-Party
14 Defendants were each duly served with the original third-party complaint, the Third-Party
15 Plaintiffs filed the FAC on January 29, 2013, containing virtually the identical factual
16 allegations and relief sought as in the original third-party complaint. The FAC alleges in
17 relevant part that:

- 18 • "All Third-Party Defendants have the fiduciary obligation to cooperate with
19 each other to timely and properly assert dissenters' rights for a beneficial
20 shareholder and customer of Just2Trade upon proper and timely request by
21 such customer." (FAC ¶ 8.);
- 22 • DTC refused to provide a consent letter and stated that if a shareholder wanted
23 to assert dissenters' rights, they must allow DTC to handle it for a fee of \$400
24 charged to each account. (FAC ¶ 19.);

- CEC's stock transfer agent, Quicksilver Stock Transfer ("Quicksilver") mailed a dissenters' rights package to Cede. (FAC ¶ 23.);
- Cede sent an assertion of appraisal rights to CEC, which contained two typographical errors. (FAC ¶ 25.);
- Cede subsequently withdrew that assertion of appraisal rights and simultaneously submitted another version with different instructions. (FAC ¶ 28.);
- On August 1, 2013, the Shares were held in "book-entry" in Cede's name on the books of Quicksilver, and that the DTC Defendants and COR Clearing caused Quicksilver to print and deliver a stock certificate for the Shares, which was not delivered to CEC within the time required by the dissenters' rights package. (FAC ¶¶ 30, 32, 34.); and
- The Third Party Defendants "jointly assumed responsibility for properly asserting Elena Sammons dissenters' rights ... for which a fee of \$400 was to be paid pursuant to a contract or binding agreement between the Third-Party Defendants and Just2Trade for intended third-party beneficiary Elena Sammons." (FAC ¶ 40.)

Third-Party Plaintiffs also allege that their failure to perfect their right to judicial appraisal was caused by the "errors" of all Third-Party Plaintiffs, which allegedly constitute "breach of contract, breach of fiduciary obligations, and/or negligence." (FAC ¶ 42.) Third-Party Plaintiffs seek a declaration that they failed to perfect their judicial appraisal rights because of these alleged "errors." (FAC ¶ 43.)

Notably, there are no allegations that Third-Party Plaintiffs had any communications or entered into any agreements with the DTC Defendants.

On February 11, 2014, Michael Sammons filed a motion to compel against Cede in connection with a subpoena (the "Motion to Compel") that, while substantially similar to the Subpoena served on DTC, was never properly served on Cede. (Dkt. 140.)

1 The DTC Defendants now move to dismiss and/or strike the FAC for lack of personal
 2 jurisdiction, for failure to comply with the impleader provisions of the Federal Rules and for
 3 failure to state a claim on which relief may be granted.²

4 **III. ARGUMENT**

5 **A. There is no Basis for Jurisdiction Over the DTC Defendants.**

6 Where a defendant moves to dismiss a complaint for lack of personal jurisdiction, the
 7 plaintiff bears the burden of demonstrating that jurisdiction is appropriate. *See Harris Rutsky*
 8 *& Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1128 (9th Cir. 2003); *see also*
 9 *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1194 (9th Cir. 1988); *Gates Learjet Corp.*
 10 *v. Jensen*, 743 F.2d 1325, 1330 (9th Cir. 1984) (“The party seeking to invoke the jurisdiction
 11 of the court, [] has the burden of establishing personal jurisdiction.”).

12 A third-party plaintiff bears the same burden. *Commercial Ins. Co. of Newark, N.J. v.*
 13 *Pacific-Peru Constr. Corp.*, 558 F.2d 948, 955 (9th Cir. 1977) (recognizing burden was on
 14 third-party plaintiff to establish personal jurisdiction); *Fairbanks Gold Mining, Inc. v. D&D*
 15 *Tire, Inc.*, No. 3:10-cv-00492-ECR-WGC, 2011 U.S. Dist. LEXIS 110244, at *7 (D. Nev.
 16 Sept. 23, 2011) (placing burden on third-party plaintiff to establish personal jurisdiction);
 17 *Monje v. Spin Master, Inc.*, No. CV-09-1713-PHX-GMS, 2013 U.S. Dist. LEXIS 76077, at
 18 *8 (D. Ariz. May 30, 2013) (“Spin Master, as the Third-Party Plaintiff, bears the burden of
 19 establishing personal jurisdiction.”); *BP W. Coast Prods., LLC v. Shalabi*, Case No. C11-
 20 1341 MJP, 2012 U.S. Dist. LEXIS 82879, at *8 (W.D. Wash. June 14, 2012) (“Shalabi,

21 ² Cede also respectfully requests that this Court adjourn Cede’s time in which to file its
 22 opposition to the Motion to Compel so long as the instant motion to dismiss and/or strike the
 23 FAC is pending.
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1 as Third-Party Plaintiff, bears the burden of establishing that the Court has personal
2 jurisdiction as required by Fed. R. Civ. P 12(b)(2).”). It is manifest that Third-Party
3 Plaintiffs have not met (and cannot meet) this burden.

4 1. *General Jurisdiction*

5 Third-Party Defendants’ filings are devoid of any facts that would demonstrate the
6 existence of general personal jurisdiction over the DTC Defendants. As set forth in the
7 accompanying Gleeson Declaration, none of the DTC Defendants are licensed to do business
8 in Nevada, have offices in Nevada, sell or lease property in Nevada, or have a Nevada
9 mailing address. (*See* Gleeson Decl. ¶ 10.)

10 Third-Party Plaintiffs also have not shown (and cannot show) that the DTC
11 Defendants purposefully availed themselves of the privilege of conducting business in
12 Nevada. *See Hoag v. Sweetwater Int’l*, 857 F. Supp. 1420, 1426 (D. Nev. 1994) (non-
13 resident’s contacts with forum contemplated “continuing and extensive involvement” in
14 Nevada) (citation omitted). The FAC contains no allegations whatsoever that the DTC
15 Defendants availed themselves of this forum – none. Indeed, none of the parties to the FAC
16 are alleged to have any presence in Nevada at all.

17 2. *Specific Jurisdiction*

18 Third-Party Plaintiffs fare no better when it comes to specific jurisdiction. “[A]
19 plaintiff must allege specific acts connecting defendant with the forum to support a finding of
20 jurisdiction” under Nevada law. *See Greenspun v. Del E. Webb Corp.*, 634 F.2d 1204, 1208
21 n.5 (9th Cir. 1980). Here, of course, Third-Party Plaintiffs have not alleged, nor could they
22 allege, any such facts with respect to the DTC Defendants. There are no allegations that any
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1 officer or employee of the DTC Defendants ever traveled to Nevada or directed
2 communications to any Nevada resident, for any purpose related to the allegations in the
3 FAC. Indeed, there are no allegations that the DTC Defendants undertook a single act in
4 Nevada, directed at Nevada, or intended to have any special consequence in Nevada. There
5 are no allegations of any contacts, no less constitutionally cognizable “minimum contacts”
6 between the DTC Defendants and Nevada upon which the DTC Defendants could be said to
7 have “reasonably anticipate[d] being haled into court” in this forum, and thus no basis for
8 exercising personal jurisdiction. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286,
9 297 (1980); *Greenspun*, 634 F.2d at 1207; *Freeman v. Second Judicial Dist. Court ex rel.*
10 *County of Washoe*, 116 Nev. 550, 553, 1 P.3d 963, 965 (2000) (“To subject a defendant to
11 specific jurisdiction, this court must determine if the defendant ‘purposefully established
12 minimum contacts’ so that jurisdiction would ‘comport with fair play and substantial
13 justice’”) (citation omitted) (citing *Trump v. Eighth Judicial Dist. Court of State of Nev. In*
14 *and For County of Clark*, 109 Nev. 687, 699–700, 857 P.2d 740, 748–49 (1993)).

15 Nor can Plaintiffs bootstrap jurisdiction through an allegation that the DTC
16 Defendants’ actions somehow had “effects” in Nevada. The “effects test,” as stated in
17 *Calder v. Jones*, 465 U.S. 783, 789 (1984), permits the assertion of jurisdiction over a non-
18 resident for acts occurring outside the forum *only when* such acts are expressly directed at
19 forum residents. It is well recognized that “the effects test does not stand for the broad
20 proposition that a foreign act with foreseeable effects in the forum state always gives rise to
21 specific jurisdiction.” *Medinah Mining, Inc. v. Amunategui*, 237 F. Supp. 2d 1132, 1137 (D.
22 Nev. 2002). Something more is required – as stated in *Bancroft & Masters, Inc. v. Augusta*
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1 *Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000), the plaintiff must establish that the defendant
2 has engaged in “wrongful conduct individually targeting a known forum resident.” Third-
3 Party Plaintiffs have not alleged (nor could they have) such individual targeting in this case.

4 Finally, with respect to jurisdiction, there are established policy reasons for declining
5 jurisdiction here. The DTC Defendants operate in New York as a depository and clearing
6 agency for the nation’s securities industry. Courts have historically, and with good reason,
7 been disinclined to open the floodgates and allow the assertion of jurisdiction over non-
8 resident institutions performing clearing functions based on any tangential contacts those
9 institutions may have within a particular state. *See, e.g., Baptichon v. Nevada State Bank*,
10 304 F. Supp. 2d 451, 461 (E.D.N.Y. 2004), *aff’d*, 125 F. App’x 374 (2d Cir. 2005) (Nevada
11 depository bank could not be subject to personal jurisdiction in New York based on its
12 forwarding of checks to New York through federally regulated channels); *Lacovara v.*
13 *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 551 F. Supp. 601, 604 (E.D. Pa. 1982) (“it
14 would be grossly unreasonable” to assert jurisdiction in Pennsylvania over a clearing firm
15 that only processed orders, did no trading in Pennsylvania, and had no offices there); *Rollin*
16 *v. William V. Frankel & Co.*, 996 P.2d 1254 (Ariz. Ct. App. 2000) (although market makers’
17 quotes are accessible to broker/dealers around the country, who might then distribute the
18 stock to customers in another state, such activity cannot amount to purposeful direction for
19 jurisdictional purposes); *Fleitas v. Union Chelsea Nat’l Bank*, 687 So. 2d 911, 912 (Fla. Dist.
20 Ct. App. 1997) (New York bank’s acceptance of a Florida check initiating collection through
21 its normal clearing house process did not subject it to long-arm jurisdiction of the Florida
22 court). Nothing in this case provides a basis to break with this longstanding precedent.
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1 Third-Party Plaintiffs have not met and cannot meet their burden of establishing
 2 personal jurisdiction over the DTC Defendants. *See Salesbrain, Inc. v. AngelVision Techs.*,
 3 2013 U.S. Dist. LEXIS 40607, 27 (N.D. Cal. 2013). For this reason, the FAC should be
 4 dismissed.

5 **B. Third-Party Plaintiffs Have Improperly Used the Impleader Procedure to**
 6 **Draw the DTC Defendants into this Litigation.**

7 Third-Party Plaintiffs may not invoke the impleader procedure because the DTC
 8 Defendants will not incur derivative or secondary liability as a result of the outcome of the
 9 CEC Action. Fed. R. Civ. P. Rule 14 sets forth that “[a] defending party may, as third-party
 10 plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or
 11 part of the claim against it.” Fed. R. Civ. P. 14(a)(1). Rule 14(a)(4) provides that “[a]ny
 12 party may move to strike the third-party claim.”

13 The purpose of the impleader procedure under Rule 14 “is to promote judicial
 14 efficiency by eliminating the necessity for the defendant to bring a separate action against a
 15 third individual who may be secondarily or derivatively liable to the defendant for all or part
 16 of the plaintiff’s original claim.” *SW Adm’rs, Inc. v. Rozay’s Transfer*, 791 F.2d 769, 777
 17 (9th Cir. 1986). The Ninth Circuit Court of Appeals, however, has adopted “narrow
 18 impleader requirements” as well as a “narrow approach” to evaluating the propriety of third-
 19 party complaints. *Wausau Underwriters Ins. Co. v. Cont’l Cas. Co.*, No. CV-07-0056-EFS,
 20 2008 WL 793618, at *5, *4 (E.D. Wash. Mar. 24, 2008) (applying the “narrow
 21 interpretation” of Rule 14(a) adhered to by the Ninth Circuit).

22 As such, Ninth Circuit courts have repeatedly held that “a third-party claim may be
 23 asserted only when the third party’s liability is in some way dependent on the outcome of the
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main claim and the third party's liability is secondary or derivative. . . . It is not sufficient that the third-party claim is a related claim; the claim must be derivatively based on the original plaintiff's claim." *United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 452 (9th Cir. 1983) (affirming dismissal of third-party complaint for failure to comply with the requirements of Fed. R. Civ. P. Rule 14); *see also Stewart v. Am. Int'l Oil & Gas Co.*, 845 F.2d 196, 200 (9th Cir. 1988) (dismissing third-party complaint and observing that "[t]he crucial characteristic of a Rule 14 claim is that defendant is attempting to transfer to the third-party defendant the liability asserted against him by the original plaintiff. The mere fact that the alleged third-party claim arises from the same transaction or set of facts as the original claim is not enough.").

Here, CEC brought the CEC Action seeking only declaratory relief against the Third-Party Defendants, among others. The CEC action will yield one of two results:

- (1) this Court will find that Third-Party Plaintiffs did not properly assert their dissenters' rights and that CEC owes nothing to them; or
- (2) this Court will find that the Third-Party Plaintiffs did properly dissent, will value the Shares in dispute, and will determine that CEC owes them money with respect to the Shares.

Third-Party Plaintiffs will be not be subject to "liability asserted against [them] by [CEC]" in either of these scenarios. 6 Wright & Miller *Fed. Prac. & Proc. Civ.* § 1446 (3d ed. 2013) (quoted in *Stewart*, 845 F.2d at 200). At best, therefore, the FAC "is a related claim" to the relief sought in the CEC Action. In no way does it give rise to the type of "secondary or derivative" liability in order to compel the DTC Defendants to participate in this action. *See One 1977 Mercedes Benz*, 708 F.2d at 452.

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2 Therefore, the FAC is improper under Rule 14 and must be dismissed and/or stricken.

3 **C. Third-Party Plaintiffs Have Failed to State the Essential Elements of Any**
4 **of the Causes of Action Against the DTC Defendants.**

5 The FAC must also be dismissed because it fails to state any cognizable claim against
6 the DTC Defendants. In order to survive dismissal under Fed. R. Civ. P. 12(b)(6), a
7 complaint must “contain sufficient factual matter, accepted as true, to ‘state a claim to relief
8 that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*
9 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This pleading imperative “requires more than
10 labels and conclusions, and a formulaic recitation of the elements of a cause of action will
11 not do.” *Twombly*, 550 U.S. at 555. “[C]onclusory allegations of law and unwarranted
12 inferences are insufficient to defeat a motion to dismiss for failure to state a claim.” *Epstein*
13 *v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996). “Although courts generally
14 assume the facts alleged are true, courts do not ‘assume the truth of legal conclusions merely
15 because they are cast in the form of factual allegations.’” *Carstarphen v. Milsner*, 594 F.
16 Supp. 2d 1201, 1207 (D. Nev. 2009) (quoting *W. Mining Council v. Watt*, 643 F.2d 618, 624
17 (9th Cir. 1981)).

18 Third-party pleadings are held to the same standard. *See e.g. United States v. Miners*
19 *Contr. & Support, Inc.*, Case No. 3:13-cv-00203-MMD-VPC, 2014 U.S. Dist. LEXIS 9150,
20 at *5 (D. Nev. Jan. 24, 2014) (applying pleading standard set forth in *Twombly* to deny
21 motion to dismiss a third-party complaint.); *PHH Mortg. Servs. v. Western Thrift & Loan*,
22 No. 2:10-CV-1626 JCM (PAL), 2011 U.S. Dist. LEXIS 27199, 7 (D. Nev. Mar. 4, 2011)

1 (same); *Fairbanks Gold Mining, Inc.*, 2011 U.S. Dist. LEXIS 110244, at *12 (same); *Colon*
2 *v. Blades*, 268 F.R.D. 143, 146 (D.P.R. 2010).

3 Third-Party Plaintiffs only identify the names of four causes of action in the “Claims
4 for Relief” section of the FAC – breach of contract, breach of fiduciary obligations,
5 negligence and a judicial declaration. (FAC ¶ 42.) Nowhere does the FAC set forth any of
6 the elements for these purported causes of action or, most importantly under *Iqbal* and its
7 progeny, supporting factual allegations demonstrating that these standards have been met.
8 Nor could Third-Party Plaintiffs establish a plausible claim for relief against the DTC
9 Defendants. *See Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009) (“Rule 8 does not empower
10 respondent to plead the bare elements of his cause of action, affix the label “general
11 allegation,” and expect his complaint to survive a motion to dismiss.”); *Aevoe Corp. v. Ae*
12 *Tech. Co.*, Case No. 2:12-cv-00053-GMN-NJK, 2013 U.S. Dist. LEXIS 31647, at *11 (D.
13 Nev. Mar. 7, 2013) (granting motion to dismiss where plaintiffs failed to plead elements of
14 cause of action even as bare conclusion.); *Pica v. Wachovia Mortg.*, No. 2:09-cv-02372-
15 GEB-KJN, 2010 U.S. Dist. LEXIS 48624, 26, (E.D. Cal. Apr. 14, 2010) (granting motion to
16 dismiss where plaintiff failed to plead basic elements of claim.).

17 First, Third-Party Plaintiffs have failed to plead facts sufficient to state a claim for
18 breach of contract. In order to plead this claim, a complaint must allege that the parties
19 entered into a contract, defendant breached and plaintiff suffered damages. *Saini v. Int’l*
20 *Game Tech.*, 434 F. Supp. 2d 913, 919-20 (D. Nev. 2006).

21 Here, there is no written contract, nor any facts that would support an implied
22 contract. Beyond allegations concerning alleged communications between the DTC
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1 Defendants and other entities, there are no allegations concerning any communications
2 between the DTC Defendants and Third-Party Plaintiffs. There are no allegations regarding
3 any relationship between the DTC Defendants and Third-Party Plaintiffs – nothing that
4 comes even close to establishing the existence of a contract between the parties. This is
5 hardly surprising. Article 8 of the UCC makes crystal clear that DTC’s relationships are with
6 its Participants. NRS § 104.8115 cmt. 4 (“a securities intermediary owes duties only to its
7 own entitlement holders,” which, in the case of DTC, are its Participants); *see also* June 4
8 SEC Order, at *6; U.C.C. §§ 8-506-508; U.C.C. § 8-507 cmt. 3 (“One of the basic principles
9 of the indirect holding system is that securities intermediaries owe duties only to their own
10 customers.”); NRS § 104.8507 cmt. 3 (same).

11 Third-Party Plaintiffs cannot salvage the FAC with the naked allegation that “Third-
12 Party Defendants jointly assumed responsibility for properly asserting Elena Sammons
13 dissenters’ rights ... pursuant to a contract or binding agreement between the Third-Party
14 Defendants and Just2Trade for intended third-party beneficiary Elena Sammons.” (FAC ¶
15 40.) This bare allegation and legal conclusion lumped against all Third-Party Defendants,
16 without more, is insufficient to sustain a cause of action for breach of contract against the
17 DTC Defendants. *See Hoff v. United States*, 2012 U.S. Dist. LEXIS 178701, *9 (D. Nev.
18 2012) (finding grouping of multiple defendants together for purposes of asserting broad
19 allegations insufficient for pleading purposes under the Federal Rules).

20 The FAC also does not contain a single substantive allegation to support Third-Party
21 Plaintiffs’ bare legal conclusion that they are third-party beneficiaries to a “contract or
22 binding agreement between the Third-Party Defendants and Just2Trade.” (FAC ¶ 40.)
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1 “Under Nevada law, third party beneficiary status is created when two elements are present:
2 (1) a clearly apparent promissory intent to benefit the third party, and (2) the third party’s
3 reliance is foreseeable. The fact that a contract confers a benefit that is merely incidental on
4 a third party is insufficient to create third party beneficiary status. Absent a clear intent by
5 the promisor to benefit the third party, such third party does not have standing to assert a
6 claim as a third party beneficiary.” *Ideal Elec. Co. v. Flowserve Corp.*, No. CV-S-02-1092-
7 DAE(LRL), 2006 WL 3434745, at *10 (D. Nev. Nov. 22, 2006) (finding that third-party
8 could not claim beneficiary status) (citing *Elizabeth E. v. ADT Sec. Sys. W.*, 839 P.2d 1308,
9 1311 (Nev. 1992); *Olson v. Iacometti*, 91 533 P.2d 1360, 1363-64 (Nev. 1975); *Liphsie v.*
10 *Tracy Inv. Co.*, 566 P.2d 819, 825 (Nev. 1977)), *order amended on other grounds*, 2007 WL
11 1108537 (D. Nev. Apr. 10, 2007). Neither of these elements is present here. Nor can Third-
12 Party Plaintiffs ever properly plead these elements because, as noted, Article 8 of the U.C.C.
13 provides that the DTC Defendants only owe duties to their Participants.

14 Second, Third-Party Plaintiffs’ fiduciary duty claim is similarly fatally defective
15 because they have not pled (nor could they) the existence of a fiduciary relationship with the
16 DTC Defendants. A plaintiff advancing a breach of fiduciary duty claim must first establish
17 the existence of fiduciary or confidential relationship between himself and the defendant.
18 *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009) (“a breach of fiduciary duty
19 claim seeks damages for injuries that result from the tortious conduct of one who owes a duty
20 to another by virtue of the fiduciary relationship”). A confidential relationship exists where
21 one party occupies toward another such a position of advisor or counselor as reasonably to
22 inspire confidence that he will act in good faith for the other’s interest. *See Perry v. Jordan*,

1 111 Nev. 943, 947, 900 P.2d 335, 338 (1995) (a confidential relationship “exists when one
2 party gains the confidence of the other and purports to act or advise with the other’s interests
3 in mind”) (internal quotations and citation omitted).

4 Third-Party Plaintiffs cannot circumvent their pleading obligations by asserting a
5 bald, conclusory statement that “[a]ll three Third-Party Defendants have the fiduciary
6 obligation to cooperate with each other to timely and properly assert dissenters’ rights for a
7 beneficial shareholder and customer of Just2Trade upon proper and timely request by such
8 customer.” (FAC ¶ 8.) This effort to lump all defendants together has been soundly rejected
9 as a means to state a cause of action for breach of fiduciary duty. *See Weinstein v. Home Am.*
10 *Mortg. Corp.*, No. 2:10-cv-1552-JCM RJJ, 2010 WL 5463681, at *4 (D. Nev. Dec. 29, 2010)
11 (“Although plaintiff states that ‘Defendants, and each of them, were in a [fiduciary]
12 relationship of special confidence with Debtor,’ that conclusory allegation fails to cite facts
13 or circumstances which establish such a relationship in this case”) (internal citations
14 omitted).

15 As noted above, the DTC Defendants maintain accounts only for the benefit of and in
16 accordance with the instructions of their Participants. There is no allegation (nor could there
17 be) that they have ever maintained any account with Third-Party Plaintiffs. *See generally In*
18 *re Adler Coleman Clearing Corp.*, 198 B.R. 70, 73 (Bankr. S.D.N.Y. 1996) (clearing firm
19 generally not liable for losses occasioned by introducing broker because clearing firm does
20 not have fiduciary relationship with customers of that broker); *see also Fox Int’l Relations v.*
21 *Fiserv Secs., Inc.*, 490 F. Supp. 2d 590, 615 (E.D. Pa. 2007) (stating that “a clearing broker,
22 ‘in performing its ordinary clearing broker function’ has no fiduciary duties to customers of
23
24

1 an introducing broker”) (citation omitted); *Warren v. Tacher*, 114 F. Supp. 2d 600, 603
2 (W.D. Ky. 2000) (“Clearing firms are generally not responsible to customers for the actions
3 of an introducing broker and do not owe fiduciary duties to the customer”); *Stander v. Fin.*
4 *Clearing Svcs. Corp.*, 730 F. Supp. 1282, 1286 (S.D.N.Y. 1990) (“[A] clearing agent... is
5 generally under no fiduciary duty to the owners of securities that pass through its hands”)
6 (citation omitted).

7 Third, Third-Party Plaintiffs similarly fail to state a cause of action for negligence, in
8 that they have not alleged (and cannot allege) any duty owed specifically to them by any of
9 the DTC Defendants. *See, e.g., Larson v. Homecomings Fin., LLC*, 680 F. Supp. 2d 1230,
10 1235 (D. Nev. 2009) (dismissing claim for negligence because defendant owed no duty to
11 plaintiff); *see also* June 4 SEC Order, at *6; U.C.C. §§ 8-506-508; U.C.C. § 8-507 cmt. 3
12 (“One of the basic principles of the indirect holding system is that securities intermediaries
13 owe duties only to their own customers.”); U.C.C. § 8-102 (defining a “securities
14 intermediary” as “a clearing corporation.”).

15 Lastly, because Third-Party Plaintiffs have failed to state a claim for relief on any of
16 their substantive causes of action, their request for declaratory relief (FAC ¶ 42), should be
17 denied as well. *See State Farm Mut. Auto. Ins. Co. v. Jafbro Inc.*, 109 Nev. 926, 928, 860
18 P.2d 176, 178 (Nev. 1993) (“It is axiomatic that a court cannot provide a remedy unless it has
19 found a wrong”); *Douglas v. Don King Prods., Inc.*, 736 F. Supp. 223, 225 (D. Nev. 1990)
20 (declaratory relief unavailable in controversies involving only “future or speculative rights.”).

21 * * *

1 Based on the foregoing, the FAC should be dismissed with prejudice and/or stricken
2 as against the DTC Defendants, together with such other and further relief as the Court
3 deems appropriate.

4 Dated: February 20, 2014

5 LAXALT & NOMURA, LTD.
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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this 20th day of February, 2014, I caused to be served a true and correct copy of the forgoing by method indicated

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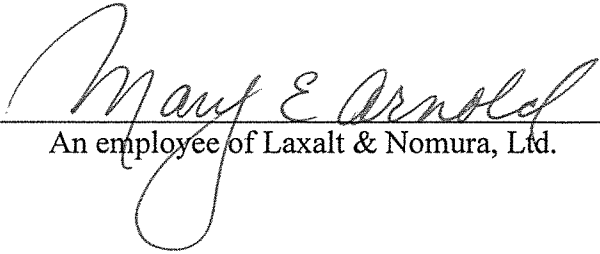
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